



statute or the Supreme Court cases construing it. Moreover, Arkansas is well aware that this Court lacks jurisdiction to entertain Arkansas's claims.

Arkansas's request to intervene comes shortly after Arkansas's failed attempt to convince the United States Supreme Court to enjoin this lawsuit in whole or in part. *Arkansas v. Oklahoma*, 126 S. Ct. 1428 (2006). In its effort to convince the Supreme Court to assume jurisdiction over the very claims Arkansas raises here, Arkansas vigorously and persuasively argued that there was no alternative forum in which Arkansas could press its arguments. Arkansas argued that "[t]his Court should exercise its original jurisdiction because there is no appropriate alternative forum in which to resolve this dispute." (Motion for Leave to File Bill of Complaint, Exhibit 1 at 9.)

Arkansas repeatedly acknowledged that the Supreme Court had exclusive jurisdiction over its arguments against Oklahoma's lawsuit. Arkansas stated that "this dispute merits the exercise of the Court's original and exclusive jurisdiction because it involves the construction of an interstate compact . . . ." (Exhibit 1 at 12 (emphasis added).) Arkansas also argued that "[i]n no forum, save before this Court, could the State of Arkansas participate, on its own behalf and on behalf of its citizens, in the adjudication of its constitutional claims." (Exhibit 1 at 27.)

Arkansas also expressly recognized that neither the Arkansas River Basin Compact nor 33 U.S.C. § 466g-1 conferred jurisdiction on the district court to entertain Arkansas's arguments against Oklahoma's lawsuit. Arkansas stated:

The Compact's forum-selection clause only confers jurisdiction upon federal district courts in narrow circumstances not present here. See 33 U.S.C. § 466g-1. Nor is the federal district court in which Oklahoma seeks to impose its laws upon Arkansas an appropriate alternative forum.

(Exhibit 1 at 9.) Elsewhere, Arkansas argued that suits between the two states in district court were only permitted under the Compact and 33 U.S.C. § 466g-1 when the suit was an action by

one state to enforce the Compact's pollution provisions against the other state. (Exhibit 1 at 27-28.) Arkansas acknowledged that the Compact's jurisdictional grant was in no way applicable here:

Accordingly, neither party seeks to pursue an enforcement action, section 466g-1 is inapplicable, and this case is governed by Congress's mandate that controversies between States are within the exclusive and original jurisdiction of the Supreme Court. See 28 U.S.C. § 1251(a).

(Exhibit 1 at 28.)

Oklahoma agrees with Arkansas on this one point -- Arkansas cannot be made a party to this case.

## II. ARGUMENT

The Constitution provides the Supreme Court with original jurisdiction over suits in which a state is a party. U.S. Const. art. III, § 2. Congress went one step further and limited jurisdiction over controversies between two or more states to the Supreme Court. 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.") "Though [§ 1251(a) is] phrased in terms of a grant of jurisdiction to [the Supreme] Court, the description of [the Supreme Court's] jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court." *Mississippi v. Louisiana*, 506 U.S. 73, 78 (1992).

A controversy between Louisiana and Mississippi illustrates well the effect of this exclusive jurisdictional grant. In the 1980s a title dispute arose between two private parties concerning a parcel of land on the border between the two states. Louisiana intervened in the quiet title action between the two private parties and filed a third party complaint against Mississippi in an effort to resolve a boundary dispute between the two states which involved the parcel of land. See *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (White, J., dissenting).

Louisiana also filed, in the Supreme Court, a motion for leave to file bill of complaint. The Supreme Court denied Louisiana's motion and three Justices dissented. The dissenters recognized that the district court would not have jurisdiction over Louisiana's claim against Mississippi. They argued that denial of the motion effectively left Louisiana without a remedy. *Id.*

After the Supreme Court denied the original action, the district court entertained jurisdiction and entered an order concerning the boundary dispute. Four years later, that order was before the Supreme Court in its appellate capacity. *Mississippi v. Louisiana*, 506 U.S. 73 (1992). The parties did not question the district court's authority to decide the boundary dispute. The appeal concerned the merits of the district court's boundary decision. The Supreme Court *sua sponte* questioned the district court's authority to address the dispute between the two states. *Id.* at 75.

Mississippi argued that the Supreme Court's "refusal to allow Louisiana to file an original complaint to determine the boundary between the two States must, by implication, have indicated that the District Court was a proper forum for the resolution of that question." *Id.* at 76. The Supreme Court disagreed. The Supreme Court recognized that it has, and exercises, the discretion to deny cases that are within its exclusive jurisdiction. *Id.* at 77. At times, jurisdiction is denied because the issues raised by the petitioning state do not possess the seriousness and dignity worthy of the Supreme Court's attention. Other times, jurisdiction is denied because a pending action in a lower court involving other parties "provides an appropriate forum in which the issues tendered [in the Supreme Court] may be litigated." *Id.* (quoting *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (emphasis in original *Arizona* opinion)). Thus, the Supreme Court has the authority to deny its exclusive jurisdiction and leave a state with no place to voice

its grievance. It exercised this authority and denied Louisiana a forum to resolve its boundary dispute with Mississippi. The Supreme Court likewise exercised its authority to deny Arkansas a forum to resolve its dispute with Oklahoma.

At first blush, it may seem inequitable for the Supreme Court to tell Arkansas that its claims cannot be heard. However, the Supreme Court undoubtedly had a good reason for doing so. As suggested in *Mississippi v. Louisiana*, the Court may have looked at the merits of the claims Arkansas wished to raise in the Supreme Court (and now in this Court) and determined that Arkansas's claims lacked merit. Or, the Supreme Court may have decided that the issues raised by Arkansas were already before this Court and that this Court was competent to resolve those issues without Arkansas's participation. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 108 (1972) ("While this original suit normally might be the appropriate vehicle for resolving this [inter-state water pollution] controversy, we exercise our discretion to remit the parties to an appropriate district court whose powers are adequate to resolve the issues."); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) (same); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (concluding that district court had jurisdiction over interstate water pollution case where Texas was suing private parties in New Mexico for polluting the water flowing into Texas and commending Texas for accommodating the limited judicial resources of the Supreme Court by turning first to the district court).

*Arizona v. New Mexico*, 425 U.S. 794 (1976), the case cited by the Supreme Court in *Mississippi v. Louisiana*, instructs that deference should be given to lower courts when the issues raised by a request for the Supreme Court's original jurisdiction are currently pending in the lower court. In that case, Arizona attempted to bring before the Supreme Court a dispute which was already being litigated in New Mexico state court between New Mexico and several Arizona

utility companies that were generating electricity in the State of New Mexico for sale to Arizona citizens and the State of Arizona. The suit challenged a New Mexico tax that had the practical effect of taxing the energy produced by these Arizona utilities and sold to Arizona citizens at a higher rate than if it were sold to New Mexico citizens. *Id.* at 794-96. Arizona sought to represent the rights of its citizens and its own rights as a consumer of electricity in its constitutional challenge to the discriminatory tax. *Id.* at 795-76. Prior to Arizona seeking to invoke the Supreme Court's original jurisdiction, the three utility companies filed a suit in New Mexico state court that raised the same constitutional issues as would be presented by the bill of complaint which the state of Arizona sought to file in the Supreme Court. *Id.* at 796. Recognizing that the Supreme Court's original jurisdiction should be invoked sparingly, *id.* (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972)), the Court declined to accept jurisdiction. The Court acknowledged that the district court was competent to address the issues raised by Arizona and, if necessary, the Supreme Court would have an opportunity to review the rulings in its appellate capacity:

In the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the issues tendered here may be litigated. If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. § 1257(2).

*Id.* at 797. The Supreme Court closed its opinion with the recognition that Arizona's attempt to invoke the Court's original jurisdiction represented a slippery slope by which the Court could end up as a potential principal forum for settling [disputes between states and persons living outside their borders]. *Id.* at 798.

In its response to Arkansas's Motion for Leave to File Bill of Complaint, Oklahoma informed the Supreme Court that the issues raised by Arkansas's Bill of Complaint were already

pending before this Court in the various motions to dismiss filed by the private parties.<sup>2</sup> If the Supreme Court believed that the issues could not effectively be resolved in this Court without the participation of Arkansas, it could have accepted jurisdiction. Instead it chose not to.

Because Arkansas is well aware that it cannot intervene in this action, Oklahoma can only assume that the purpose of Arkansas's seven page motion to intervene, thirteen page brief in support of that motion, and hundreds of pages of exhibits (including a seventeen page motion to dismiss and twenty-two page brief in support) is to draw Oklahoma into an argument on the merits of Arkansas's claims. This, Oklahoma declines to do at this point.

The Supreme Court is the only forum with jurisdiction over the arguments Arkansas wishes to raise here. The Supreme Court has chosen to abstain from hearing Arkansas's claims. As the Supreme Court held in *Mississippi v. Louisiana*, 506 U.S. 73 (1992), the Court's refusal to hear the case did not, by implication, permit Arkansas to proceed in this Court. Perhaps Arkansas said it best: "In no forum, save before [the Supreme] Court, could the State of Arkansas participate, on its own behalf and on behalf of its citizens, in the adjudication of its constitutional claims." (Exhibit 1 at 27.)

### III. CONCLUSION

WHEREFORE, premises considered, Oklahoma respectfully requests that this Court deny the motion to intervene brought by the State of Arkansas, ex rel. Mike Beebe, Attorney General, and the Arkansas Natural Resources Commission.

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<sup>2</sup> See Oklahoma's Response in Opposition to Arkansas's Motion for Leave to File Bill of Complaint, Exhibit 2 at 11-12.

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May 18, 2006



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